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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. FINANCIAL CASUALTY & SURETY, INC., Defendant and Appellant.	E070480 (Super.Ct.Nos. CIVDS1806898 & 16CR066364) OPINION

APPEAL from the Superior Court of San Bernardino County. Michael A. Smith, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Law Office of John Rorabaugh, John Mark Rorabaugh and Crystal L. Rorabaugh for Defendant and Appellant.

Michelle D. Blakemore, County Counsel, S. Mark Strain, Deputy County Counsel for Plaintiff and Respondent.

Defendant and appellant Financial Casualty and Surety, Inc. (FC Surety), a bail bond surety, appeals the denial of their motion to exonerate bail and subsequent entry of summary judgment. FC Surety through its bail agent, Bail Hotline Bail Bonds, posted two bonds under the same booking number—one for a misdemeanor and one for a felony—to secure criminal defendant Joseph Richard Omaghomi's release from custody. Omaghomi failed to appear and the two bonds were forfeited. FC Surety filed a motion to exonerate bail on both bonds. The trial court granted the motion on one bond securing Omaghomi's appearance on the misdemeanor charge, which was never filed, but denied the motion as to the second bond securing Omaghomi's appearance on the felony. Summary judgment was entered against FC Surety.

On appeal, FC Surety contends (1) this court should vacate forfeiture and exonerate bail because bail was set unconstitutionally; and (2) the forfeiture order was in excess of the power of attorney clause in the bail contract, voiding the contracts on both bonds.

FACTUAL AND PROCEDURAL HISTORY

On October 2, 2016, bail bond No. FCS100-1695090 (Felony Bond) was executed by FC Surety, through Bail Hotline Bail Bonds, in the amount of $100,000. It was to provide for Omaghomi's release from custody on a violation of Vehicle Code section 2800.2 and Penal Code[1] section 530.5, subdivision (a) (both felonies) booking No. 1610300068. Omaghomi was to appear for arraignment on December 6, 2016. The

[1] All further statutory references are to the Penal Code unless otherwise indicated.

record does not provide how the bail amount was set. The surety contract included the following language: "This Power of Attorney is for use with Bail Bonds only. . . . This power is void if altered or erased, void if used in combination with other Powers of this company or Powers from any other surety, void if used to furnish bail in excess of the maximum stated amount of this Power. This Power Number is unique and can only be used once. The obligation of the surety shall not exceed the sum of" $100,000.

In addition, on October 2, 2016, bail bond No. FCS10-1689893 (Misdemeanor Bond) was executed by FC Surety, through Bail Hotline Bail Bonds, in the amount of $10,000. It was under the same booking number, 1610300068. It was to provide Omaghomi's release from custody on a charge of a violation of section 148, subdivision (a)(1), a misdemeanor. Arraignment was scheduled for December 6, 2016. It contained the same power of attorney language as set forth, *ante*.

On November 28, 2016, Omaghomi was charged in a felony complaint with evading an officer in violation of Vehicle Code section 2800.2, subdivision (a). No charging documents for the violation of Penal Code section 148, subdivision (a)(1) appear in the record.

On December 6, 2016, Omaghomi failed to appear for arraignment. A bench warrant was issued. Bail was set for $250,000. Both the Felony Bond and Misdemeanor Bond were forfeited. Notice was given. Both bonds were extended for 180 days on July 19, 2017.

On January 15, 2018, FC Surety filed its motion to vacate forfeiture and exonerate bail (Motion). FC Surety noted that the trial court had ordered both the Misdemeanor and

Felony Bonds to be forfeited on the failure to appear. They argued the bonds exceeded the power of attorney and were void. FC Surety argued that it had limited its liability to "the use of one power of attorney to prohibit the use of multiple bail bonds on one criminal case." Here, both bonds were executed under one booking number: 1610300068. FC Surety argued, "Both bonds were combined by the court into a single case in violation of the terms of the bond." Further, it combined the bonds to reach $110,000, which was in violation of the individual bonds. FC Surety concluded, "[T]he court lost jurisdiction over these bonds when it combined them in one case in violation of the power of attorney contained in these bonds."

The People filed partial opposition to the Motion. The People did not oppose exoneration of the Misdemeanor Bond. The People argued the bonds were executed for two separate charges. Omaghomi would not have been released if the bail on both charges were not bonded out. The People conceded that since no charges were filed on the violation of section 148, subdivision (a)(1), the misdemeanor, the Misdemeanor Bond should be exonerated under section 1305.

The hearing was conducted on March 15, 2018. The trial court first noted that there were two separate bonds. First was the Misdemeanor Bond in the amount of $10,000. Since no charges were filed, the trial court would exonerate the bond. The trial court found that the Felony Bond was separate and that Omaghomi failed to appear on the case.

FC Surety argued that both bonds were posted under the same booking number and filed onto the same case. A separate misdemeanor case was never filed. The jail required separate bonds for separate charges when they released Omaghomi from custody. Counsel argued that they were both posted on the same case, effectively putting $110,000 on one case. The trial court found, "I don't think there's an adequate basis to set aside the forfeiture and exonerate the bond in that matter. I think there's a separate bond, there's a failure to appear, and a forfeiture on it. So the motion to set aside the forfeiture and reinstate and exonerate the $100,000 bond is denied."

The trial court issued an order exonerating the Misdemeanor Bond. Summary judgment was entered against FC Surety on April 6, 2018, on the Felony Bond. Notice of entry of judgment was mailed to FC Surety on April 9, 2018. On May 1, 2018, FC Surety filed its notice of appeal from the March 15, 2018, order denying the Motion and from summary judgment.

DISCUSSION

A. AMOUNT OF BAIL[2]

FC Surety first contends the bail set for Omaghomi, which presumably was set based on the county jail officials relying on a bail schedule as authorized by section 1269b, was unconstitutional because it was not based on an individualized consideration

[2] On August 28, 2018, the Governor approved Senate Bill No. 10. Senate Bill No. 10 reforms California's existing system of cash bail. (Sen. Bill No. 10, approved by Governor, Aug. 28, 2018 (2018 Reg. Sess.) ch. 244, § 3.) However, S.B. 10 qualified for the November 3, 2020, ballot and will not take effect until it is approved by the majority of the voters. (See https://www.sos.ca.gov/elections/ballot-measures/qualified-ballot-measures/ as of August 5, 2019.)

of Omaghomi's ability to pay; a hearing setting the amount of bail was not held; and the trial court did not consider less restrictive nonmonetary options. Officials at the county jail merely relied upon the bail schedule, which set the amount based on the seriousness of the offense, which did not comport with the constitutional requirements. To the extent FC Surety's argument is that section 1269b is unconstitutional on its face, such claim lacks merit. Moreover, FC Surety has not shown it can claim that Omaghomi's constitutional rights were violated in order to support exonerating the bond.

Section 1269b sets forth the rules for posting of bail. Subdivision (b) provides, "If a defendant has appeared before a judge of the court on the charge contained in the complaint, indictment, or information, the bail shall be in the amount fixed by the judge at the time of the appearance. If that appearance has not been made, the bail shall be in the amount fixed in the warrant of arrest or, if no warrant of arrest has been issued, the amount of bail shall be pursuant to the uniform countywide schedule of bail for the county in which the defendant is required to appear, previously fixed and approved as provided in subdivisions (c) and (d)." Subdivision (c) of section 1269b provides, "It is the duty of the superior court judges in each county to prepare, adopt, and annually revise a uniform countywide schedule of bail for all bailable felony offenses and for all misdemeanor and infraction offenses except Vehicle Code infractions." Section 1269b, subdivision (e) requires that the judges who set the countywide schedule of bail "consider the seriousness of the offense charged."

Section 1269c provides that a defendant "may make application to the magistrate for release on bail lower than that provided in the schedule of bail or on his or her own recognizance. The magistrate or commissioner to whom the application is made is authorized to set bail in an amount that he or she deems sufficient to ensure the defendant's appearance or to ensure the protection of a victim, . . . and to set bail on the terms and conditions that he or she, in his or her discretion, deems appropriate, or he or she may authorize the defendant's release on his or her own recognizance. If, after the application is made, no order changing the amount of bail is issued within eight hours after booking, the defendant shall be entitled to be released on posting the amount of bail set forth in the applicable bail schedule."

In sum, " '[b]ail permits a defendant to be released from actual custody into the constructive custody of a surety on a bond given to procure the defendant's release.' [Citation.] The courts are responsible for adopting a countywide schedule of bail. [Citation.] "The schedules typically list the offense by code section and description, then indicate the recommended amount of bail. The bail schedule usually specifies additional amounts for cases in which sentence enhancing allegations or other extraordinary facts are present. The jails have a copy of the bail schedules. . . . They are also available from the court clerk. . . . [Arrestees] may post the amount of bail listed in the bail schedule to effect their release before appearing in court." ' " (*Dant v. Superior Court* (1998) 61 Cal.App.4th 380, 386.)

The California Supreme Court has considered Section 1269b. It has found, "[S]ection 1269b(a) offers an arrested person held in custody—one who has not yet been

arraigned—an expeditious process by which specified jail personnel, an authorized sheriff's or police department employee, or a court clerk may accept bail (in an amount previously fixed by warrant of arrest or countywide bail schedule); issue an order for the arrested person's release; and set a time and place for the next appearance, which is often the arraignment hearing. This administrative procedure is in lieu of the individualized, but somewhat cumbersome, written court approval set out under section 1269a, which requires a 'written order of a competent court or magistrate admitting the defendant to bail' delivered to the officer having custody of the defendant." (*County of Los Angeles v. Financial Casualty & Surety, Inc.* (2018) 5 Cal.5th 309, 315.) Further, in *In re Kenneth Humphrey* (2018) 19 Cal.App.5th 1006, 1043-1044, review granted May 23, 2018, S247278 (*Humphrey*), that court recognized "The bail schedule . . . serves useful functions in providing a means for individuals arrested without a warrant to obtain immediate release without waiting to appear before a judge."

Here, based on the record before us, the county jail set the amount of bail based on a bail schedule. FC Surety argues that "[t]here is no explanation as to how the amount of bail was set by the court." He insists the trial court had an independent duty to both make the necessary findings to support the bail amount and make an adequate record of the decision. However, in this case, the trial court was never given an opportunity to address bail as Omaghomi never appeared at the arraignment. Moreover, FC Surety readily paid the bail amount to secure Omaghomi's release set by the jail officials. The bail was set by the county jail when Omaghomi was released, and he failed to appear for his arraignment. FC Surety concedes that "there is nothing inherently unconstitutional about

a state having a bail schedule." FC Surety provides no authority to support that section 1269b is unconstitutional on its face under the facts of this case.

FC Surety argues that the trial court had the duty to "both make the necessary findings to support the bail amount and make an adequate record of the decision." FC Surety insists the "Court relied solely on the bail schedule when setting bail in this amount, in violation of [Omaghomi's] right to substantive due process." Again, here, the bail was set by the jail officials and the trial court was not given an opportunity to address the amount of bail because Omaghomi failed to appear at the arraignment.

Moreover, FC Surety cannot raise that Omaghomi's rights were violated. " 'As a general rule, a third party does not have standing to bring a claim asserting a violation of someone else's rights.' " (*People ex. rel. Becerra v. Superior Court* (2018) 29 Cal.App.5th 486, 499; see also *Powers v. Ohio* (1981) 499, U.S. 400, 410 ["In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties"].) There are exceptions to the general rule (*Powers*, at p. 411), but FC Surety has failed to argue the exceptions apply and we will not make such an argument for them.

FC Surety relies on *Humphrey*, *supra*, 19 Cal.App.5th 1006. In *Humphrey*, the criminal defendant was arrested for various felonies. At his arraignment, he sought to be released on his own recognizance. The trial court denied the request, instead imposing $600,000 bail, relying on a bail schedule and based on the seriousness of the crime and the vulnerability of the victim. (*Id.* at pp. 1017-1018.) Humphrey filed a motion for a

bail hearing pursuant to section 1270.2.[3] He insisted that his bail should be reduced or he be released on his own recognizance because he could not pay the bond amount and was entitled to an individualized consideration pursuant to the Fourteenth Amendment. (*Humphrey*, at pp. 1018-1019.)

At the hearing, the trial court agreed to reduce bail to $350,000 but would not release the defendant due to public safety and flight risk concerns. There was no consideration of his ability to pay. (*Humphrey*, *supra*, 19 Cal.App.5th at p. 1021.) Humphrey was unable to pay bail and filed a petition for writ of habeas corpus.

Humphrey claimed in his petition that the bail was set by the court without any findings of his ability to pay or consideration of other alternatives to posting bail in violation of his Fourteenth Amendment rights. (*Humphrey*, *supra*, 19 Cal.App.5th at p. 1015.) He did not argue that "California's money bail system is facially unconstitutional." (*Id.* at p. 1015.) Humphrey sought relief by either immediate release or by remanding to the lower court for an expedited hearing taking into account his ability to pay and considering nonmonetary conditions of release. (*Id.* at pp. 1015-1016.)

We need not consider further the impact of *Humphrey*. Initially, as discussed *ante*, *Humphrey* involved the trial court setting bail after a hearing. The instant case involves

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[3] Section 1270.2 provides, "When a person is detained in custody on a criminal charge prior to conviction for want of bail, that person is entitled to an automatic review of the order fixing the amount of the bail by the judge or magistrate having jurisdiction of the offense. That review shall be held not later than five days from the time of the original order fixing the amount of bail on the original accusatory pleading. The defendant may waive this review."

Omaghomi's release from jail based on the bail schedule prior to a hearing, a practice the *Humphrey* court recognized was necessary to secure the immediate release of defendants.

In addition, in *Humphrey*, the appellate court noted, " 'Habeas corpus is an appropriate vehicle by which to raise questions concerning the legality of bail grants or deprivations.' " (*Humphrey*, *supra*, 19 Cal.App.5th at p. 1022.) This is so because the criminal defendant in *Humphrey* was claiming that he was denied due process of law and deprived of his personal liberty under the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, and article I, section 7 of the California Constitution. (*Id.* at p. 1022.) Here, FC Surety, the surety in this case, not the criminal defendant, argues the Felony and Misdemeanor Bonds are void because Omaghomi's due process rights were violated when the bail was set. However, as previously stated, FC Surety provides no authority that allows it to raise Omaghomi's constitutional rights were violated, which entitles them to have the Felony Bond exonerated. Moreover, as stated in *Humphrey*, the proper vehicle to attack the bail grant is through a petition for writ of habeas corpus. FC Surety simply has not shown it can raise such constitutional arguments on its own.[4]

At oral argument, FC Surety relied on *Buffin v. City and County of San Francisco* (N.D. Cal. Oct. 19, 2018) No. 4:15-cv-04959-YGR, 2019 WL 1017537 and *Timbs v. Indiana* (2019) ___ U.S. ___ [139 S.Ct. 682] to support its claims. In *Timbs*, the United

[4] For the first time on appeal, FC Surety argues summary judgment is a consent judgment that must comply with the consent given to be valid, and it did not consent to the unconstitutional setting of bail in this case. We will not consider this argument raised for the first time on appeal.

States Supreme Court held that the Excessive Fines Clause of the Eighth Amendment is an incorporated protection applicable to the States through the Fourteenth Amendment. (*Timbs, supra,* ___ U.S. ____ [139 S.Ct. at pp. 686-687].) Once again, FC Surety has not provided authority to support that it could raise such constitutional argument on its own. In *Timbs,* the petitioner, Timbs, was a party to the action, which involved the taking of his $42,000 Land Rover that the State of Indiana suspected was used to transport heroin. (*Id*. at p. 686.) *Timbs* does not give FC Surety standing to raise any constitutional claim on behalf of Omaghomi.

In *Buffin v. City and County of San Francisco*, the plaintiffs sought to challenge San Francisco's felony and misdemeanor bail schedule in a civil action. Plaintiffs included the arrested plaintiffs, Buffin and Crystal Patterson. (*Buffin, supra*, 2019 WL 1017537 *1-2.) In that case, the California Bail Agents Association was allowed to intervene as a *respondent* to defend the bail schedule and the constitutionality of section 1269b. (*Buffin*, at p. *6.) The United States District Court, Northern District concluded the San Francisco bail schedule violated the plaintiffs' due process and equal protection rights based on the deprivation of the plaintiffs' liberty, and granted summary judgment in favor of the plaintiffs. (*Id*. at pp. *16-24.) Initially, this court is not bound by decisions of intermediate federal courts. (*People v. Gray* (2005) 37 Cal.4th 168, 226.) Moreover, FC Surety has not shown how *Buffin* stands for the proposition that it can raise the claim of Omaghomi's deprivation of liberty on its own. These cases do not help FC Surety.

B. POWER OF ATTORNEY LANGUAGE

FC Surety argues that the trial court placed two bonds on the same case in violation of the power of attorney in the Misdemeanor and Felony Bonds. This resulted in an aggregate bond in the amount of $110,000 on the felony charge and violated the power of attorney, which prohibited stacking of other Powers. Both bonds were void because the trial court placed both bonds on one case.

"[T]he 'bail bond is a contract between the surety and the government whereby the surety acts as a guarantor of the defendant's appearance in court under the risk of forfeiture of the bond.' " (*People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 657; see also *County of Los Angeles v. Financial Casualty & Surety, Inc.*, *supra*, 5 Cal.5th at p. 314.)

"Certain fixed legal principles guide us in the construction of bail statutes. The law traditionally disfavors forfeitures and this disfavor extends to forfeiture of bail." (*People v. Surety Ins. Co.* (1985) 165 Cal.App.3d 22, 26.) "Any ambiguities in a surety contract will be construed against the drafter . . . . While bail forfeitures are generally disfavored and the statutes affecting forfeiture procedures must be interpreted when possible to avoid this result (see *People v. Ranger Ins. Co.* (1992) 9 Cal.App.4th 1302, 1305 . . .), this rule does not mean the terms of a bail contract should be construed in the light most favorable to rendering the contract void." (*People v. Ranger Ins. Co.* (1998) 61 Cal.App.4th 812, 816.)

" 'The basic goal of contract interpretation is to give effect to the parties' mutual intent at the time of contracting. [Citations.] When a contract is reduced to writing, the parties' intention is determined from the writing alone, if possible. [Citation.] "The words of a contract are to be understood in their ordinary and popular sense." ' " (*People v. International Fidelity Ins. Co.* (2010) 185 Cal.App.4th 1391, 1396.) No extrinsic evidence was presented here to assist in the evaluation of the contract language. According, we independently construe the language. (*Ibid.*)

The language in the contracts here did not prevent the trial court from concluding the two bonds were separate. The language "This power is void if altered or erased, void if used in combination with other Powers of this company or Powers from any other surety, void if used to furnish bail in excess of the maximum stated amount of this Power. This Power Number is unique and can only be used once. The obligation of a surety shall not exceed the sum of" did not warrant exonerating the Felony Bond. FC Surety provided the two bonds fully aware that they were based on the same booking number. There is no language in the contract addressing the situation where no charges would be filed in one of the cases covered by the bonds. Moreover, the trial court never combined the two bonds to increase the Felony Bond. According to the minute order, it forfeited both bonds separately, never combining the two bonds. When FC Surety brought the fact that the misdemeanor was never filed by the district attorney to the trial court's attention, the trial court immediately exonerated the Misdemeanor Bond keeping the original Felony Bond intact for the original amount of $100,000. FC Surety has failed to establish that the contract language entitles it to have the Felony Bond exonerated.

DISPOSITION

The order of the trial court is affirmed in full. Respondent is awarded costs on appeal.

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MILLER
Acting P. J.

We concur:

CODRINGTON
J.

RAPHAEL
J.